THE HISTORICAL AND LEGAL CONTEXTS OF ISRAEL'S BORDERS[1]

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INTRODUCTION

More than sixty years after the admission to the United Nations of the state of Israel with no internationally recognized boundaries,[2] a central question remains: what legal rights to territory does Israel have and, assuming such rights exist, how far do they reach, that is, what are Israel's rightful borders? These questions in turn are connected to others: how might Israel's legal rights inform an Israeli-Palestinian peace agreement and perhaps even a general Arab-Israeli peace agreement? The reverse of these questions is relevant too: what are the sources of Arab rights, and how might these rights inform a peace agreement?

This chapter examines these issues because a viable lasting peace depends on reliability and mutual satisfaction (or at least not too great dissatisfaction) among the parties, not just strength of arms alone. In short, the law is a necessary ingredient of reliability and also may provide a common language for negotiators.

The first step is to "find" the law. Therefore, this chapter begins with the legal sources of Israel's rights: the League of Nations Mandate for Palestine, the establishment, recognition, and admission of the state of Israel to the United Nations, and the 1949 Armistice Agreements. The chapter examines the border question and the impact of UN Security Council resolutions and ongoing negotiations that have resulted in agreements, not treaties establishing peace. The resulting conclusion is that Israel's boundaries for the most part are set as a matter of law. Final boundaries between Israel and

any Palestinian state that may be established should reflect what the parties agree to – and, after numerous agreements, they are or should be close to being able to define a boundary. To Israel's north, if there is peace, not just a stable frontier, Syria and Israel need to agree on a boundary. It may involve full, partial, or conditional (with demilitarized zones, for example) restoration to Syria of the Golan Heights. The chapter ends by suggesting a way of analyzing the legal context that might help negotiators seeking a formal Israeli-Palestinian peace agreement.

I. ISRAEL'S RIGHTS UNDER INTERNATIONAL LAW TO TERRITORY IN THE MIDDLE EAST

From 1511 to 1917, "Palestine" was part of the Ottoman Empire, although the term did not denote a defined people or area. What today is understood as Palestine was never geographically a single sovereign entity, state, or internationally recognized sovereign. In fact, geographically the area called Palestine was not administered in Ottoman times as a single unit. World War I resulted in the end of the Ottoman Empire and Turkish claims to far-flung Ottoman territories. More important was the establishment of the League of Nations, the first global international organization and the predecessor of the United Nations. While it ultimately failed as a vehicle for maintaining international peace, the League of Nations nonetheless constituted a forum in which states could make authoritative decisions and establish norms. What the Covenant of the League of Nations promised, and what the League did, have continuing political and legal significance.

The League of Nations Covenant established the Mandate system of trusteeships to dispose of territory of the defeated Central Powers.[3] Thus, the geographical area called Palestine covering what now are Israel, Jordan, the West Bank, and Gaza became a Mandate of the League of Nations. Britain was the Mandatory Power. Syria/Lebanon also became a League of Nations Mandate with France as the Mandatory Power. Boundaries, if any, were set by agreement between Britain and France. As a general matter, the Mandate system redefined colonialism as a public trust for indigenous peoples. The Mandate for Palestine contained a variation on this theme.

A. THE LEAGUE OF NATIONS MANDATE AND THE ESTABLISHMENT OF ISRAEL

On July 24, 1922, the League of Nations adopted and the British government accepted the Mandate:

> Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country. ... The Mandatory shall be responsible for placing the country under such political, administrative, and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion.[4]

MANDATE FOR PALESTINE

AND MEMORANDUM BY THE BRITISH GOVERNMENT RELATING TO ITS APPLICATION TO TRANSJORDAN, APPROVED BY THE COUNCIL OF THE LEAGUE OF NATIONS ON SEPTEMBER 16TH, 1922.

Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country;

The British Mandate for Palestine was a binding treaty between Great Britain and the League of Nations that recognized "the historic connection of the Jewish people with Palestine."

By the terms of the Mandate, the British Palestine administration was to facilitate both Jewish immigration and "close settlement by Jews on the land, including State lands and waste lands not required for public purposes."[5] Notably, the League's use of the language "for reconstituting their national home in that country" indicated recognition of a preexisting Jewish right, derived from the Jews' three-thousand-year-old historical connection to the land.

The Mandate for Palestine therefore had as its principal purpose the implementation of the 1917 Balfour Declaration, which in fact the Mandate incorporated in almost identical language.[6] In 1920, at San Remo, the Mandate territory had been defined as running from the Mediterranean Sea, including the Gaza Strip, to Iraq and Saudi Arabia. In September 1922, Britain requested, and the League of Nations approved, a division of the territory with respect to Jewish "close settlement" of the land, separating what is now Jordan from the Mandate territory – 75 percent – dedicated to the creation of the Jewish national home.[7] Thus, the League of Nations granted Jews rights to territory in Palestine west of the Jordan River without limitation. Article 80 of the UN Charter – the "Palestine" article – affirmed the ongoing validity of this grant by the League and the international instruments embodying them.[8] By virtue of its consistent articulation of peoples' rights, the League of Nations also laid a legal foundation, which the United Nations has carried forward, for eventual assertions – for example, by the Palestinians of today – of a right to territory and to have it recognized.

B. ISRAEL BECOMES A STATE, MAY 1948

On May 14, 1948, Israel declared itself a state. Boundaries were uncertain. Repeated proposals further to partition the area of the Mandate west of the Jordan River into Jewish and Arab states had come to nothing. The Zionists had accepted the 1947 UN General Assembly recommendation

set forth in Resolution 181 (II) (1947).[9] The resolution proposed to the Mandatory Power and to the UN Security Council a Jewish and an Arab state with an international city of Jerusalem. The Arab states at the United Nations voted against the recommendation and threatened to use force to prevent it coming into effect. When Israel declared itself a state, five Arab armies – Egypt, Iraq, Saudi Arabia, Syria, and Transjordan (now Jordan) – attacked.

The war ended with armistice agreements. Israel occupied more territory than the 1947 General Assembly resolution had recommended for the Jewish state but less than the Mandatory territory open to Jewish settlement.[10] Armistice agreements between Israel and Egypt, Israel and Jordan, Israel and Lebanon, and Israel and Syria, concluded in 1949, demarcated boundaries. Unlike the Israel-Lebanon Line and parts of the Israel-Syria Line, which tracked the international boundary between the Syria/Lebanon and Palestine Mandates, the Armistice Demarcation Lines that did not follow recognized international boundaries contained the common thought (as expressed in the agreement between Israel and Jordan) that such lines were "without prejudice to future territorial settlements or boundary lines or claims of either Party related thereto."[11] The Jordanians insisted on this language to preserve future diplomatic and, it is reasonable to assume, military options.

The expectation or hope in 1949 was that peace treaties would replace armistice agreements. For that reason, the United Nations admitted Israel to membership after the Armistice Agreements were concluded, giving Israel a definable, if not finally demarcated, territorial extent. Sixty years later, two peace treaties and a multiplicity of lesser agreements among the parties in fact have been concluded. Also in the mix have been a number of UN Security Council resolutions, which have constituted the parties' agreed framework for peace negotiations and brought the demarcation of boundaries closer to completion.

C. THE SIX-DAY WAR AND THE OCCUPIED TERRITORIES

From 1949 to June 1967, Israel's Arab neighbors were engaged more or less in continuous guerrilla warfare against Israel. Israel's armed forces contended with attacks aimed indiscriminately at military and civilian targets. At some periods in the 1950s, for example, the risk of attacks on Israeli civilian automobile traffic reached a point where the names of the occupants of motor vehicles were recorded so that if cars were blown up, the corpses could be identified. In the wake of the Suez Crisis of 1956, which, because of Egypt's nationalization of the Suez Canal, Egyptian support for Algerian rebellion against France, and the ongoing attacks on Israel, resulted in Anglo-French-Israeli military operations against Egypt, the United Nations established a peacekeeping force in the Sinai Peninsula to separate Israeli and Egyptian forces. This step, together with political agreements articulated in interlocking speeches at the UN General Assembly in 1957, laid the basis for uneasy peace until 1967.

In the spring of 1967, with the United States mired in Vietnam, Egypt, Syria, and Jordan were tempted to try their strength with Israel. The Soviet Union encouraged them, although it is perhaps excessive to blame Moscow entirely for Egyptian, Syrian, and Jordanian behavior.

At Egypt's request, UN Secretary-General U Thant withdrew the UN peacekeeping force from the Sinai Peninsula. Egypt blockaded the Straits of Tiran, Israel's route to the Red Sea, which it had promised not to do in 1957. Weeks of intense diplomacy to head off war accomplished little except to persuade the international community that Israel was left with no nonmilitary options to defend itself against threats, military buildups, and the uniting of Arab armies under Egyptian command.[12] Israel struck on June 5. Within six days, its forces had pushed the Arab armies back to the Suez Canal, the Jordan River, and across the Golan Heights. Israel took control of, and eventually purported to annex, East Jerusalem, which had been outside the territory awarded Israel in 1949. The UN Security Council repeatedly condemned such annexation measures as null and void.[13]

This history is legally relevant because it provides the backdrop for the subsequent forty years of Arab-Israeli diplomacy. Regrettably, this important historical context rarely appears in UN statements or Arab-Israeli peacemaking or diplomacy.

Yet the events of 1967 form the context of the most important of UN Security Council resolutions on the Arab-Israeli conflict, Resolution 242 (1967) adopted November 22, 1967. The United States, mindful that Israel had withdrawn from Sinai in 1957 at U.S. insistence without a peace agreement, was determined that the aftermath of the 1967 war not repeat the 1957 experience. This history is critically important to understand why Israel took control of the West Bank, Gaza Strip, Sinai Peninsula, and Golan Heights in 1967, and why it has not withdrawn from every inch of these disputed territories without peace agreements (Israel, of course, withdrew its civilians and forces from Gaza in 2005). UN Security Council Resolution 242 (1967), subsequently strengthened in legal terms by Resolution 338 (1973), established the framework for ensuing diplomatic steps and for consideration of legal rights. More than forty years later, Resolution 242 remains the most important framework, accepted by the parties, for Arab-Israeli peace and has been applied in every agreement Israel has reached with its neighbors.

Resolution 242 (1967) provides in part:

> ... *Emphasizing* the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security, ...
>
> 1. Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
>
> (i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict;
>
> (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.[14]

Resolution 242 used the term "territories occupied," not "*the* territories occupied." The resolution left open for negotiation where Israel's final boundaries would be in exchange for withdrawal from Egyptian, Jordanian, Syrian, and disputed territory, rather than requiring a restoration of the 1949 Armistice Demarcation Lines as the international boundary of Israel; the resolution thus treated that boundary only as marking a minimum Israeli territory. Resolution 242 arguably entitled Israel to more territory than that. Adjustments were contemplated, as implied by the requirement for "secure and recognized boundaries." The U.S. ambassador to the United Nations, Arthur Goldberg, stated in November 1967 that the 1949 Armistice Demarcation Lines did not meet this standard. In 1967, minor adjustments of the borders, together with the establishment of demilitarized zones, as Resolution 242 suggested, seemed the way to achieve a secure peace. The expectation was not realized, at least not in the short run.

In the wake of the Yom Kippur War of 1973, the Security Council used even stronger language:

> 2. *Calls* upon the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts;
>
> 3. *Decides* that, immediately and concurrently with the cease-fire, negotiations shall start between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East.[15]

These documents framed the conclusion of the Israel-Egypt Peace Treaty of 1979 and the Israel-Jordan Peace Treaty of 1994. And while the Palestinians were not a state party included in Resolution 242 in 1967, 242 would become the framework within which Israel concluded agreements with the Palestine Liberation Organization (PLO) and its newly created Palestinian Authority in 1993 on principles and steps designed to lead to a peace treaty between Israel and the Palestinians. These agreements formed the basis for UN Security Council Resolution 1397 (2002) in which the Security Council "affirm[ed] a vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders."[16]

Ongoing diplomacy so far has failed to realize every aspect of the vision of Resolution 242. It has resulted, however, in the formal agreement between Israel and the PLO to resolve "remaining issues, including: Jerusalem, refugees, security arrangements, borders, relations and cooperation with other neighbors, and other issues of common interest relating to permanent status. . .through negotiations."[17]

II. RIGHTS AND PEACE

By 2011, Israel's borders had been finalized on three fronts: with Egypt and the Gaza Strip, with Lebanon, and with Jordan. The frontier with Egypt was established by the Israel-Egypt treaty of 1979 just as the Israel-Jordan boundary was set by the 1994 treaty. Israel's boundaries with the Gaza Strip have been established de facto by Israel's withdrawal of armed forces and civilians in 2005 and relinquishment of any territorial claim there. Israel's border with Lebanon always

has tracked the internationally recognized boundary between the Mandate for Palestine and the Mandate for Syria/Lebanon.

Israel's borders with the Palestinian Authority and Syria remain uncertain. The 1993 Oslo Agreements and their progeny have gone far toward recognizing a Palestinian state and toward demarcating boundaries, but the process has not reached an end. Indeed, one may argue that the remaining issues, principally how Jerusalem can remain united while serving as capital of two countries, territorial adjustments here and there, and even whether a prospective state of Palestine and its peace with Israel should be policed by international peacekeepers to prevent violence, while important, are hardly issues that pose within their resolution existential threats to Israel or to a Palestinian state. Those who harbor the wish to destroy either Israel or a Palestinian state exist and may yet achieve their ambitions. That fact should act as pressure to reach final agreement. So far, it has not done so.

Israel still holds the Golan Heights, which it captured from Syria in 1967. Offers to return the Heights as part of a peace agreement between Israel and Syria have not led to agreement. So, Israel's borders are recognized on a number of fronts; two unsettled areas remain. As far as the Palestinian border is concerned, one may say that all that remains is to define the distribution of the hitherto undefined remainder of the territory of the League of Nations Mandate for Palestine: those parts of the West Bank not yet distributed by means of agreement between Israel and the Palestinian Authority.

III. CONCLUSION

The question of Jewish/Israeli rights to territory in the Middle East is important to any complete resolution of the Arab-Israeli conflict. In entering political and territorial agreements with Israel, Egypt, Jordan, and the Palestinian Authority have recognized such rights and determined all but the Israel-Palestine and Israel-Syria borders. Israel's territorial rights do not derive from, or depend on, such agreements. Rather, to the extent they do not derive from claims rooted in ancient historical connections to the territory and religious belief, they come from the most important parts of contemporary international law – the authoritative legal and political decisions of the first global international organization, the League of Nations, as reaffirmed by the United Nations. Too much of the world's minimum public order and too many of peoples' international-law rights derive from the same sources for them to be dismissed as crucially important foundations of Israel's right to territory but otherwise irrelevant. That international law, carried forward to today, affirmed that Israel too has a right to self-determination in its territory. For all its flaws,[18] including its slighting of the history and documentation of Israel's legal rights, the International Court of Justice Advisory Opinion on the Israeli security "wall" assumes, by not challenging it, that Israel has a right to exist on territory in the Middle East.[19] The court's assertions of Palestinian rights to self-determination do not undermine this reading of the opinion.[20]

The diplomacy of the past sixty years has gone far to establishing final boundaries for Israel within and outside the 1949 Armistice Demarcation Lines. Within those boundaries, Israelis enjoy self-

determination. Outside them, others enjoy it. Voting and other civil, political, and human rights depend on it.

Recognition of rights to land is a necessary but not sufficient condition for peace in the region. Rights are based in law, the same law in which international agreements are rooted and from which they gain their strength. Rights do not need to be exercised and may be waived. And they may be affected by conduct. Thus, an aggressor may lose standing in a contest of legal claims by lacking "clean hands."[21] But if a state or people are to benefit from the rule of law that creates their rights, they must accept that the same law grants others rights. Israelis and Palestinians have taken that step in the various agreements already signed between them. It remains for them to take the other measures necessary to complete the process of formalizing peace. Through their negotiations, Israelis and Syrians and Israelis and Lebanese have taken the same step as well. They all need to take the process to conclusion if the Middle East is to know peace.

NOTES

1 The views expressed are the author's own and do not necessarily reflect the views of the U.S. Department of Defense, the National Defense University, or any other entity with which I am or have been associated.

2 Israel's application for membership and the General Assembly decision to admit Israel said nothing about borders. The General Assembly accepted the application in 1949 after the Armistice Agreements between Israel and Egypt, Jordan, Lebanon, and Syria demarcated armistice lines. UN Docs. UN Gen. Ass. Res. 273 (III), May 11, 1949, S.C.Res. 69 (1949), Mar. 4, 1949, S/1093, 1/1267 (none of these documents discussed borders).

3 This system also implicitly called into question all colonial regimes not based on the consent of the governed.

4 Mandate for Palestine, Preamb. and Art. 2.

5 *Id*. Art. 6.

6 *See* Balfour to Rothschild, Nov. 2, 1917, http://avalon.law.yale.edu/20th_century/balfour.asp.

7 David Fromkin, *A Peace to End All Peace* (New York: Avon, 1989), 514.

8 According to Paul S. Riebenfeld, Article 80 was drafted as a result of Zionist representations at the San Francisco conference in order to protect, in addition to the existing rights of any states, also those of "any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties." It mentions "peoples." The rights referred to were in particular those of the *Jewish people* as the beneficiary of the Palestine Mandate, in an international system based on the membership of *states*.

Paul S. Riebenfeld, "The Legitimacy of Jewish Settlement in Judea, Samaria and Gaza," in Edward M. Siegel, ed., *Israel's Legitimacy in Law and History* (New York: Center for Near East Policy, 1993), 41-42.

9 GA Res. 181 (II), Nov. 29, 1947.

10 The Mandate and the resolution are of different character. The Mandate set forth the obligations of the Mandatory power. By its terms, the resolution was a recommendation.

11 Israel-Jordan Armistice, Apr. 3, 1949, Art. V1 (9). See also Israel-Egypt Armistice, Feb. 24, 1949, Art. V (2); Israel-Lebanon-Armistice, Mar. 23, 1949, Art. V; Israel-Syria Armistice, Jul. 20, 1949, Art. V (1), (3). Reprinted in John Norton Moore, ed., *The Arab-Israeli Conflict*, vol. 3 (Princeton: Princeton University Press, 1974), Documents 401, 383, 393, 410.

12 *See, e.g.,* Dennis Ross, *The Missing Peace* (New York: Farrar, Straus & Giroux, 2004), 21-22 and works cited therein.

13 *E.g.,* S. Res. 252 (1967), May 21, 1968; 267 (1968), Jul. 3, 1968; 298 (1971), Sept. 25, 1971. These resolutions, firm as they are in tone and tint, are not by their terms decisions binding on the international community under Article 25 of the UN Charter ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"). While some would argue on behalf of a contextual analysis to determine if a resolution meets the test of Article 25, the Permanent Five Members of the United Nations have agreed that the word "decides" must appear in that portion of a resolution intended to bind the international community. Thus, even at this stage in the historical development of Security Council practice under the UN Charter, the presence or absence of the word "decides" in a Security Council resolution determined whether all or part of such resolution constituted a decision for purposes of Article 25. See a more nuanced discussion in Jost Delbrück, "Article 25," in Bruno Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 2002), 453-464.

The international law of occupation makes occupation irrelevant to title to territory. *See, e.g.,* Nicholas Rostow, "Gaza, Iraq, Lebanon: Three Occupations under International Law," 37 Israel Yearbook on Human Rights 205 (2007).

14 S. Res. 242 (1967), Nov. 22, 1967.

15 S. Res. 338 (1973), Oct. 22, 1973.

16 S. Res. 1397 (2002), Mar. 12, 2002.

17 http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Principles.

18 *See, e.g.,* Eli Hertz, *Reply to the Advisory Opinion of 9 July 2004 in the Matter of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2nd ed. (New York: Myths and Facts, Inc., 2006); Nicholas Rostow, "Wall of Reason: Alan Dershowitz v. the International Court of Justice," 71 Albany L. Rev. 953 (2008), and works cited therein.

19 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (Jul. 9), *available at* http://www.icj_cij.org/docket/files/131/1671.pdf (hereinafter cited as ICJ Opinion). The court does not specify where Israel may exercise those rights, a point noted by Judge Al-Khasawneh, Concurring opinion, paras. 8-10.

20 ICJ Opinion, paras. 70, 88 *et seq.*

21 Stephen M. Schwebel, "What Weight Conquest?," 64 Am. J. Int'l. L. 344 (1970).